SINGAPORE REPORTS

MOHAN SINGH v. MALKIYAT KAUR

[C.A. (Chua, Choor Singh and D'Cotta JJ.) May 9, 1978]
[Singapore — Civil Appeal No. 73 of 1977]

Family Law — Divorce petition against wife — Ground of desertion — Petition dismissed — Costs unpaid by husband — Second petition on grounds of 7 years' separation against wife — Stay of second petition until payment of costs of first petition — Women's Charter (Cap. 47), s. 82(1)(e).

Practice and Procedure — Costs — Divorce — Stay of second petition until payment of costs of first petition.

The appellant filed a petition against the respondent for dissolution of marriage alleging that the respondent had deserted him without cause for a period of at least three years immediately preceding the presentation of the said petition. The petition which was heard in May, 1974 was dismissed with costs. The respondent's costs of the petition were duly taxed for the sum of $4,870 plus $203 for taxing fee and allocatur. The appellant had not paid the costs. On July 7, 1977, the appellant filed a second petition against the respondent for dissolution of marriage, alleging that the respondent had lived separately and apart from the appellant for a continuous period of at least seven years immediately preceding the presentation of the petition. The respondent took out a summons asking that all further proceedings upon the second petition be stayed until the costs of the previous petition had been paid. The learned Chief Justice affirmed the order of the Assistant Registrar in granting the respondent's application. The appellant appealed.

Held, dismissing the appeal: (1) when a wife had to take proceedings against her husband or he against her she ought to be provided at his expense with the means of bringing the case before the court or of properly defending the case brought against her. Whether she was successful or not the rule was that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband;

(2) it was right and in accordance with not only the practice of the Divorce court but also of general judicial discretion that the wife should not be put to further trial without her costs of the first trial being paid.

Cases referred to:-

(1) *Abdy* v. *Abdy* (1896) 12 L.T.R. 524.
(2) *Yeatman* v. *Yeatman* (1869) 39 L.J. (P & M) 37.
(3) *Sanders* v. *Sanders* [1911] P. 101.
(4) *Kemp-Welch* v. *Kemp-Welch* [1910] P. 233.
(5) *Robertson* v. *Robertson* (1881) 6 P.D. 119.
(6) *Silver* v. *Silver & Greenfell* [1924] P. 163, 172.

COURT OF APPEAL.

Amarjit Singh for the appellant.

J.G. Advani (*S. Gunaseelan* with him) for the respondent.

Chua J. (delivering the judgment of the Court): The appellant in this case is the husband and the respondent is the wife. On February 16, 1973, the appellant filed a petition against the respondent for dissolution of marriage alleging that the wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the said petition. This petition was heard in May 1974, and was dismissed with costs. The respondent's costs of the petition were duly taxed for the sum of $4,870 plus $203 for taxing fee and allocatur. The appellant has not paid the costs.

On July 7, 1977, the appellant filed a second petition against the respondent for dissolution of marriage. This petition alleged that the respondent had lived separately and apart from the appellant for a continuous period of at least seven years immediately preceding the presentation of the petition namely from and since February 10, 1970, when the respondent left the matrimonial home and is unlikely to be reconciled with him. (Section 82(1)(e) of the Women's Charter Cap. 47).

The respondent took out a summons asking that all further proceedings upon the second petition might be stayed until the costs of the previous petition has been paid. The Assistant Registrar granted the respondent's application.

The appellant appealed against the order of the Assistant Registrar to a Judge in Chambers and on November 4, 1977, the learned Chief Justice dismissed the appeal.

The appellant then appealed to this court. We dismissed the appeal and we now proceed to give our reasons.

Counsel for the appellant submitted that the common law principle is that an application to stay proceedings on the ground that the costs of the former suit were unpaid could not succeed unless the former suit was the same or substantially the same as in the suit in which the application was being made. It was submitted that the cause of action in the second petition was different from that in the first petition. In support of his submission counsel cited the cases of *Abdy* v. *Abdy*[1] and *Yeatman* v. *Yeatman*.[2]

In the case of *Abdy* v. *Abdy* the wife first presented a petition for judicial separation on the ground of her husband's adultery. The petition was dismissed and the wife was ordered to pay certain costs which however were not paid and she filed another suit for judicial separation by reason of the husband's alleged desertion of her. The husband applied that further proceedings in the second suit be stayed until the costs of the former suit had been paid. Barnes J. in his judgment said that it was clear from the case of *Yeatman* v. *Yeatman*, that an application to stay proceedings on the ground that the costs of a former suit were unpaid could not succeed, unless the cause of action in the former suit was the same as in the case in which the application was being made; that in this case the causes of action were not identical, for in the former suit the cause of action was adultery and in the present one desertion. The application to stay was refused.

It is to be noted that in *Abdy* v. *Abdy* it was the wife who was the petitioner in both suits.

Yeatman v. *Yeatman* was overruled by the Court of Appeal in *Sanders* v. *Sanders*.[3]

The relation of husband and wife in matters of litigation in the Divorce Court is very special and very peculiar.

It is clear from the authorities that when a wife has to take proceedings against her husband or he against her she ought to be provided at his expense with the means of bringing the case before the court or of properly defending the case brought against her.

In our view whether she is successful or not the rule is that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband. Every member of the Court of Appeal in *Kemp-Welch* v. *Kemp-Welch*[4] adopted the view that Brett L.J. (in the case of *Robertson* v. *Robertson*[5]) was perfectly right when he said it was a matter of high policy and high propriety that the husband should pay the wife's costs of defending a proceeding against her in the Divorce Court.

In the Divorce Court the wife is entitled to defend herself at her husband's expense. If he has not paid the wife's costs of the first petition she is put in greater difficulty in defending the second petition.

Warrington L.J. in *Silver* v. *Silver & Greenfell*[6] said (at p. 172):

"I agree with the learned president that it is a rule of the Divorce Division, and the repeated decisions of the Court of Appeal, first of all in *Robertson* v. *Robertson*, and later in *Kemp-Welch* v. *Kemp-Welch & Crymes* and *Sanders* v. *Sanders*, make it clear that it is at the option of the wife, who is made a respondent by her husband to a petition for dissolution of the marriage, to claim that proceedings in the suit shall be stayed until her costs have been provided for, and if there has been an abortive trial that the second trial shall not proceed until the costs of the first trial have been paid. That is the right of the wife. If any authority were wanted for that proposition it is found in the judgments of each of the Lords Justices in *Kemp-Welch* v. *Kemp-Welch & Crymes*, and I particularly refer in that connection to the judgment of Kennedy L.J. It is not a matter of discretion; the discretion which the court has is over the costs themselves; but when once the costs have been ordered to be paid and it is a question of staying further proceedings until those costs have been paid, that is the right of the wife; but that right may be lost just as any other right of a litigant may be lost by proceedings which the court holds amount to an election not to insist on that right, and to have brought about by that election a course of action on the part of the other side upon the assumption that the strict rights would not be insisted upon."

Counsel for the appellant also made the point that the learned Chief Justice had failed to take into consideration the appellant's inability to pay the costs of the previous proceedings as attributable to his misfortune rather than his fault. The short answer to this is that if he can find funds for himself for two suits he cannot escape the obligation of placing his wife in an equally favourable position.

We were of the view that there being in this case an order for payment of costs in the first suit, it is right and in accordance not only with the practice of the Divorce Court but also of general judicial discretion that the wife in the present case should not be put to further trial without her costs of the first trial being paid.

We accordingly dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *David Marshall; Advani & Hoo.*

COMPTROLLER OF INCOME TAX v. B.S. PTE. LTD.

[O.C.J. (Chua J.) May 16, 1978]
[Singapore — Motion in Suit No. 654 of 1978]

Revenue Law — Dispute as to tax payable by company — Company in voluntary winding up — Writ of summons taken out by Comptroller — Appeal by company to Board — Application for order that writ be stayed until appeal heard by Board — Income Tax Act (Cap. 141), ss. 86 & 90 — R.S.C. 1970, O. 14.

The defendant company was incorporated on December 31, 1971 and on July 19, 1972, the members resolved that the company should be voluntarily wound up. A notice of the winding up of the company and calling for creditors to submit particulars of their claim by August 22, 1972 was published in the newspapers on July 22, 1972. No proof of debt had been lodged by the plaintiff in respect of the present claim. The plaintiff assessed the company to tax for the year of assessment in the sum of $11,602,014. The company's application to the plaintiff for the said assessment to be reviewed and revised was rejected. The company then filed with the Income Tax Board of Review (hereinafter called the Board) a Notice of Appeal. On March 3, 1978 the plaintiff issued a writ claiming $11,602,014 arrears of tax and penalty for non-payment of tax amounting to $580,100.70 making a total claim of $12,182,114.70. The plaintiff then applied on March 11, 1978 for judgment under Order 14. The company prayed for an order that the writ be stayed until the appeal had been heard by the Board.

Held: (1) the court had power to stay proceedings against a company after a voluntary winding up had commenced. The onus lay on the liquidator to show that an action against the company should be stayed. In an application of this kind the court has a discretion and the court would not normally order a stay of action unless the liquidator could show some sufficient reason to justify such interference;

(2) in a voluntary winding up, after the winding up had begun, a creditor of a company had an option as to his remedy for the purpose of enforcing a claim which he had against the company;

(3) in this case to allow a stay would defeat the clear intention of Parliament and every unwilling taxpayer could circumvent section 86 of the Income Tax Act by just lodging an objection and could thereby caused considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer was to pay his tax and present his arguments against the assessment made upon him before the Board.

Cases referred to:-

(1) *Re Norper Investments, Pty. Ltd.* 15 A.L.R. 603.

(2) *Comptroller of Income Tax* v. *R.S.T.* [1962] M.L.J. 216.

(3) *Comptroller of Income Tax* v. *A. Co. Ltd.* [1966] 2 M.L.J. 282.

(4) *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia* [1973] 2 M.L.J. 163.

MOTION IN SUIT.

C. Darvall Q.C. (*A.P. Godwin* with him) for the applicant/defendant.

Nand Singh Gandhi (State Counsel) for the respondent.

Chua J.: The defendant in this case, disputing it owes $12 million in tax arrears plus penalties claimed by the plaintiff, the Comptroller of Income Tax, applies to this court for an order that the writ of summons be stayed and that the plaintiff be restrained from taking any further step in this suit until further order of the court.

The following facts are not in dispute. The defendant company (the company), was incorporated on